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9
10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JOEL CHAVEZ-DURAN,

16 Defendant.

4:21-CR-06028-RMP-3

United States'
Response to Defendant's Motion to
Suppress Evidence

17 Plaintiff, United States of America, by and through Joseph H. Harrington,
18 Acting United States Attorney for the Eastern District of Washington, and Stephanie
19 Van Marter, Assistant United States Attorney for the Eastern District of Washington,
20 submits the following Response to Defendant's Motions to Suppress, filed at ECF No.
21 51, requesting Defendant's Motion be denied.

22
23 **I. INTRODUCTION**

24 On July 22, 2021, Defendant was charged by complaint with one count of
25 Possession with Intent to Deliver 40 Grams or More of Fentanyl, in violation 21
26 U.S.C. § 841(a)(1), (b)(1)(B)(vi). ECF No. 1. On August 4, 2021, the grand jury
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1 returned a Superseding Indictment charging the Defendant with being a member of a
2 Conspiracy to Distribute 50 grams or More of Actual Methamphetamine and 400
3 grams or more of Fentanyl as well as for the conduct which he was initially arrested
4 pursuant to the above-mentioned complaint. *See*, ECF 23.
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6 On August 20, 2021, Defendant filed a Motion to Suppress the evidence seized
7 at the time of his arrest, namely 2000 Fentanyl laced pills located in his pocket. ECF
8 51. The Defendant asserts two bases for the suppression of this evidence; the officers
9 did not have reasonable suspicion to conduct an exterior pat down of his person for
10 weapons prior to his voluntary transport and acknowledging there was a consent issue,
11 asserts his consent to the pat down frisk was not voluntary.
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14 To the contrary, the Defendant was identified driving a vehicle that was the
15 subject of a federal search warrant and part of a large drug trafficking investigation.
16 *See*, Attachment A, Discovery Pages 0000004.2-83, 00000010.1-.12. (sealed affidavit
17 in support of search warrant). The vehicle was lawfully stopped to effectuate that
18 search warrant. The Defendant and sole occupant of the vehicle, known to DEA and
19 suspected to be a part of the same drug trafficking organization, (hereafter DTO) was
20 advised of the search warrant. Based upon the totality of the circumstances, the
21 officers and agents present did in fact have a reasonable and articulated suspicion that
22 he could be in possession of a weapon(s) to justify the pat down frisk once he was
23 removed from the vehicle. Even without that lawful basis for the frisk, the Defendant
24 expressly consented to the pat down search after requesting a courtesy ride from the
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1 agents. After having found a knife in his pocket and during the continued exterior pat
2 down, the officer advised he felt what appeared to be a baggie of pills in his shorts
3 pocket. The Defendant stated, without a question being asked or further search
4 conducted, that he had 2,000 pills in his pocket. Only after making this statement, did
5 the officers conduct a search of his pocket and seize the 2000 fentanyl laced pills.
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7 The United States respectfully submits there is no basis to suppress the
8 evidence obtained from the Defendant and his motion should be denied.
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10 **II. FACTS OF THE INSTANT CASE¹**

11 Beginning in May 2021, the Drug Enforcement Administration (DEA) began to
12 investigate a Drug Trafficking Organization (DTO) operating in the Tri-Cities area of
13 Washington State. ECF No. 1 at ¶ 6, *See also*, Attachment A. Through this
14 investigation, the DEA conducted three controlled buys of pound quantities of
15 methamphetamine and over 1,000 pills laced with Fentanyl. *Id.* DEA discovered that
16 the DTO was utilizing several residences, vehicles, and identified a business they
17 suspected was a front for the DTO, Affordable Landscaping. *Id.* Based on the
18 information discovered during the investigation, agents obtained several search
19 warrants to include the location of the business, Affordable Landscaping, located at
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25 ¹ The United States offers this as a summary only prepared by the assigned AUSA not
26 the potential witnesses involved. Although the summary was prepared from the
27 discovery materials, the United States defers to the proposed exhibits which include
28 the incident reports, recordings, and upcoming testimony as the best source as to the
factual background. All exhibits have previously been provided in discovery.

1 3829 Kennewick Ave., Kennewick, WA.² DEA also obtained several search warrants
2 for vehicles that were utilized by the DTO during the investigation, to include a black
3 Ford Edge with Washington license plate BUG3081. ECF No. 1 at ¶ 6-7.
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5 The federal search warrants were executed on July 16, 2021. Prior to the
6 execution of the search warrants, a confidential source had been in communication
7 with a member of the DTO, Co-Defendant Mendoza-Ruelas, who advised the CS in
8 recorded communications, that he was to receive a shipment of approximately 30
9 pounds of methamphetamine and over 45,000 fentanyl laced pills. The CS, through
10 the DEA, arranged to purchase a large quantity of that methamphetamine and
11 Fentanyl laced pills from Mendoza Ruelas. The timing of the execution of the search
12 warrants was impacted due to these communications and the discussion of the
13 impending drug shipment.
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17 During the execution of the search warrants at the Affordable Landscaping
18 location, the large drug shipment was not located. *See*, Attachment B Discovery
19 Pages 0000014.02-95. However, there were numerous K9 dog alerts to the strong
20 odor of narcotics at various locations through the entire property, to include suitcases
21 and storage bins in the basement area of one of the residences previously identified as
22 being the location where drug shipments were processed. *Id.* Moreover, over
23 \$160,000 in US currency was located hidden inside a wall in a separate house and
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27 ² Affordable landscaping was located on one parcel of land with three separate
28 residences. The search warrants included all three residences.

1 multiple AK style rifles, packaging materials, scales and other evidence of distribution
2 were located. *Id.*

3 In additional to the missing shipment of drugs, DEA also did not locate several
4 suspects in the investigation, nor did they locate the Black Ford Edge to execute the
5 search warrant. As a result, Task Force Agent (TFA) Pitts and DEA continued with
6 the investigation to include looking for this vehicle. *See*, Attachment D, Discovery
7 Pages 10000060.01-07. On July 21, 2021, TFA Pitts believed he observed the vehicle
8 back at the Affordable Landscaping property. *Id.* See also ECF No. 1 at ¶ 8. TFA Pitts
9 and other officers traveled to the location to try and confirm it was the same vehicle.
10 *Id.* at ¶ 8-11. At approximately 2:50p.m., Agents observed the vehicle leave in tandem
11 with one of the “Affordable Landscaping” work trucks. *Id.* at ¶ 12. TFA Pitts and
12 other surveillance team members continued to surveille the vehicle to determine who
13 may be driving it and where it was traveling. Agents observed the vehicle travel to a
14 work site where it was parked along with the Affordable Landscaping Truck.
15 Between 3:00pm and 5:20pm, agents surveilled both the Affordable Landscaping
16 Truck and the Ford Edge until the Ford Edge (identified as Target Vehicle 1) departed
17 the job site at approximately 5:25pm. *Id.* at ¶ 12-17. At the time it departed, agents
18 were unsure who was driving.

19 TFA Pitts requested Pasco Police Officer Erickson and Kennewick Police
20 Officer Kris Safranek to conduct a vehicle stop pursuant to the federal search warrant
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1 for the vehicle. ECF No. 1 at ¶ 18, *See also* Attachment C, body camera footage³.

2 TFA Pitts asked them to initiate the traffic stop and to further identify the driver⁴. The
3 officers conducted the traffic stop and the sole occupant and driver identified himself
4 as Joel Chavez Duran. He also provided his Washington driver's license.
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6 During this initial contact with the Defendant, Ofc. Safranek also requested the
7 Defendant's phone number as was also requested by TFA Pitts to assist in identifying
8 the driver and his association to the DTO. The Defendant provided a phone number.
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10 *See*, Attachment D and ECF 1. Ofc. Safranek observed a phone next to the Defendant
11 in the passenger seat that the Defendant had checked twice during his contact. Ofc.
12 Safranek asked if the number he gave was for that phone. *Id.* The Defendant stated
13 "no." Ofc. Safranek that asked what the number was for the phone next to the
14 Defendant. The Defendant advised he did not know. ECF No.1at ¶ 18-19. Ofc.
15 Safranek advised that he could show him how to locate the number in his phone and
16 the Defendant voluntarily gave the phone to the officer to show him. The phone was
17 not seized at that time and no other information was taken from the phone. *Id.*
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21 ³ At the time of this traffic stop, the Kennewick Police Department had not outfitted its
22 patrollers with body cameras. Pasco Police Department however, had. As a result,
23 only Ofc Erickson had a recording of part of the traffic stop. Since he did not contact
24 the Defendant until after his arrest, there is no audio recording of the initial contact
25 with the Defendant.

26 ⁴ Ofc. Safranek makes reference to a "ruse" to identify the driver in the beginning of
27 the video. TFA Pitts will testify he did not request them to utilize a ruse as none was
28 needed given the presence of the search warrant. However, TFA Pitts did want them
to identify the driver given the nature of the investigation and that several suspects
were still outstanding. Further, TFA Pitts advised he would arrive on scene to advise
the Defendant of the search warrant.

1 As noted in the video, when TFA Pitts and SA Savage arrived on scene and
2 prior to them contacting the Defendant, SA Savage advised the officers they were
3 seizing the car and would just “kick him loose” referring to the Defendant. *See*,
4 Attachment C at 3:34. He further asked the officer, “suppose we could drive him
5 somewhere?” TFA Pitts intended to ask the Defendant if he would engage in an
6 interview with him and stated he would “ask him if he wants to come back” referring
7 to the department for the interview. *See*, Attachment C at 4:06. TFA Pitts was also
8 advised of the identity of the driver. Prior to the traffic stop, TFA Pitts knew there
9 were two “Joel’s” identified as members of this DTO. Joel Espinoza was more
10 specifically discussed in the search warrant affidavit as it related to the property at
11 Affordable Landscaping. *See*, Attachment A. However, contrary to the Defendant’s
12 assertions, TFA Pitts will testify that he also knew of a second “Joel” related to
13 several members of this same DTO. This was affirmed during the execution of the
14 search warrants at Affordable landscaping, that there was a second “Joel” living at the
15 location. *See*, Discovery pages 10000049.01-49.05. Based upon the scope and status
16 of the investigation at the time, TFA Pitts had an articulated concern for officer safety
17 and that the Defendant could be armed.

23 As seen on the video, TFA Pitts approached the driver side of the vehicle,
24 identified himself and advised they had a search warrant for the vehicle. *Id.* See also
25 ECF No.1 at ¶ 20 and Attachment D. TFA Pitts further advised they would be seizing
26 the vehicle to effectuate the warrant. *Id.* Defendant was informed that he was not
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1 under arrest. TFA Pitts inquired if he would be willing to be interviewed regarding
2 the drug investigation back at the Pasco Police station rather than conduct an
3 interview on the side of the road. *Id.* The Defendant initially agreed and there was
4 discussion of a voluntary transport back to the Pasco PD. *See*, Attachment C. At
5 approximately 6:40 into the body camera footage, Ofc. Safranek reiterated the
6 Defendant was not under arrest and they he had agreed to be transported back to Pasco
7 PD. *Id.* At approximately 8:20 into the body camera footage, the transporting officer
8 approached SA Savage and TFA Pitts about the courtesy transport. SA Savage and
9 TFA Pitts advised the Defendant no longer wanted to be transported to the Pasco PD
10 for an interview and so instead they inquired if he could give courtesy transport where
11 the Defendant asked. *Id.* The Defendant was inside his vehicle during the entire
12 contact to this point. *Id.*

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14 The Defendant argues that the officer's decision to allow the Defendant to
15 remain in the vehicle is somehow inconsistent with their reasonable suspicion as to
16 whether he could be armed. To the contrary, the fact that he was allowed to remain in
17 the vehicle, not only goes to the voluntary nature of the contact, but from an officer
18 safety perspective, was a temporary way to control an unknown variable. Had the
19 Defendant engaged in any other suspicious or furtive behavior, it would have
20 impacted that decision. It was not until the Defendant exited the vehicle that a pat
21 down search would be necessary.
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1 As TFA Pitts will testify, after going back and forth regarding whether the
2 Defendant was going to come talk to the agents voluntarily, the Defendant told TFA
3 Pitts he wanted to call later to meet. As a result, the issue of what the Defendant
4 wanted to do for transport was addressed. *See*, ECF No.1, Attachments C and D.
5
6 TFA Pitts will describe that while the Defendant was still in the vehicle, he looked
7 around trying to figure out what to do. *Id.* It was during this time that the Defendant
8 appeared to be nervous and trying to distance himself from the vehicle. *Id.*
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10 Recognizing this and because of the location of the traffic stop, TFA Pitts told him he
11 could get a courtesy ride or do what he wanted. The Defendant then asked for the
12 courtesy ride back to his work site. Contrary to the Defendant's assertions, TFA Pitts
13 will testify that he advised the Defendant at that time, they would need to do a pat
14 down search before he was allowed inside the officer's vehicle for the courtesy ride.
15
16 This was told to the Defendant while he was still seated in his vehicle. The Defendant
17 expressly stated "ok" to the pat down search. TFA Pitts then asked him if he had any
18 weapons, and the Defendant stated he did not. It was after that exchange and in
19 agreement to the conditions of the courtesy ride, that the Defendant got out of the
20 vehicle. It is the United States position that the Defendant got out of the vehicle
21 specifically so they could perform the pat down search. During this time, the
22 Defendant had his cell phone with him and did not ask to make any calls or
23 arrangements for a different ride. *Id.*
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1 Officer Safranek with TFA Pitts present, conducted the voluntary pat down of
2 Defendant's outer clothing and uncovered a folded knife located in Defendant's front
3 pocket. *Id.* at 22. *See*, Attachment C at 9:57. Officer Safranek continued his pat
4 down of Defendant's outer clothing and felt what he thought may be pills in
5 Defendant's left cargo pants pocket. *Id.* Officer Safranek leaned over to convey this
6 to TFA Pitts. *Id.* Upon overhearing this, Defendant stated that there were 2,000 pills
7 in his cargo pocket. *Id.* At approximately 10:27 into the video, you can see Ofc.
8 Safranek turn his head toward TFA Pitts and advise of what he felt. The Defendant is
9 then seen speaking to TFA Pitts, consistent with the reports and testimony as to when
10 he advised of the pills in his pocket. *Id.*

11 As a result of this voluntary statement, Defendant was placed under arrest and
12 subsequently searched incident to arrest. ECF No. 1 at ¶ 23. This search found four
13 plastic bags with light blue pills officers believed to be laced with fentanyl. *Id.* There
14 is no basis for suppression and Defendant's motion should be denied.

15 **III. DISCUSSION**

16 **A. THE OFFICER'S PAT DOWN FRISK OF DEFENDANT WAS LAWFUL.**

17 *1. The Officers had a Reasonable and Articulable Basis to Conduct an Exterior 18 Pat Down of the Defendant for Officer Safety*

19 If a law enforcement officer concludes, in light of his training and experience,
20 that the person may be "presently armed and dangerous," that officer is "entitled for
21 the protection of himself and others in the area to conduct a carefully limited search of
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1 the outer clothing” to discover weapons. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). To
 2 justify a pat-down, “the police must harbor reasonable suspicion that the person
 3 subjected to the frisk is armed and dangerous.” *Arizona v. Johnson*, 555 U.S. 323,
 4 327 (2009).

6 To establish reasonable suspicion a suspect is armed and dangerous, thereby
 7 justifying a frisk, “the police officer must be able to point to specific and articulable
 8 facts which, taken together with rational inferences from those facts, reasonably
 9 warrant that intrusion.” *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. A “mere ‘inchoate and
 10 unparticularized suspicion or hunch’ ” that a person is armed and dangerous does not
 11 establish reasonable suspicion, *Maryland v. Buie*, 494 U.S. 325, 332, 110 S.Ct. 1093,
 12 108 L.Ed.2d 276 (1990) (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868) (some internal
 13 quotation marks omitted), and circumstances suggesting only that a suspect would be
 14 dangerous if armed are insufficient, see *United States v. Flatter*, 456 F.3d 1154, 1157
 15 (9th Cir.2006). There must be adequate reason to believe the suspect is armed. *See id.*

19 As the Ninth Circuit analyzed in *Thomas v. Dillard*, 818 F.3d 864, 876–77 (9th
 20 Cir. 2016),

22 Reasonable suspicion is an objective standard, asking whether “a reasonably
 23 prudent [person] would have been warranted in believing [the suspect] was
 24 armed and thus presented a threat to the officer's safety while he was
 25 investigating his suspicious behavior.” *Terry*, 392 U.S. at 28, 88 S.Ct. 1868.
 26 This inquiry requires consideration of all the facts and circumstances an officer
 27 confronts in the encounter; we consider the totality of the circumstances. *See*
 28 *id.*; *Navarette v. California*, — U.S. —, 134 S.Ct. 1683, 1687, 188 L.Ed.2d
 680 (2014); *Arvizu*, 534 U.S. at 273, 122 S.Ct. 744; *United States v. Sokolow*,
 490 U.S. 1, 8, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); 877 *United States v.*

1 *Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States*
2 *v. Burkett*, 612 F.3d 1103, 1107 (9th Cir.2010).

3 In assessing the totality of the circumstances, relevant considerations may
4 include: observing a visible bulge in a person's clothing that could indicate the
5 presence of a weapon, see *Flatter*, 456 F.3d at 1157 (citations omitted); seeing a
6 weapon in an area the suspect controls, such as a car, see *Michigan v. Long*, 463
7 U.S. 1032, 1050, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); “sudden
8 movements” suggesting a potential assault or “attempts to reach for an object
9 that was not immediately visible,” *Flatter*, 456 F.3d at 1157 (citing *United*
10 *States v. Flippin*, 924 F.2d 163, 164–66 (9th Cir.1991)); cf. *Ybarra v. Illinois*,
11 444 U.S. 85, 93, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (holding reasonable
12 suspicion was lacking where an individual's hands were empty and he made “no
13 gestures or other actions indicative of an intent to commit an assault”); “evasive
14 and deceptive responses” to an officer's questions about what an individual was
15 up to, *Burkett*, 612 F.3d at 1107; unnatural hand postures that suggest an effort
16 to conceal a firearm, see *id.* (suspect opened the passenger car door with his left
17 hand and kept his right hand next to his body and appeared to reach for his coat
18 pocket); and whether the officer observes anything during an encounter with the
19 suspect that would dispel the officer's suspicions regarding the suspect's
20 potential involvement in a crime or likelihood of being armed, see *Terry*, 392
21 U.S. at 28, 88 S.Ct. 1868; *United States v. \$109,179 in U.S. Currency*, 228 F.3d
22 1080, 1086 (9th Cir.2000).

23 Thus, the type of crime a person is suspected of committing may be highly
24 relevant to the existence of reasonable suspicion for a weapons frisk. *Id.* at 878. The
25 Ninth Circuit has held that “it is reasonable for an officer to assume a suspected
26 narcotics trafficker is likely armed.” *Id.* (citing *United States v. \$109,179 in United*
27 *States Currency*, 228 F.3d 1080 (9th Cir. 2000)). The scope of the frisk must be
28 confined to an “intrusion reasonable to discover guns, knives, clubs, or other hidden
instruments.” *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

1 In the instant case, Defendant's behavior and the totality of the circumstances
2 would lead to reasonable suspicion that he may be armed and dangerous, justifying a
3 *Terry* frisk for weapons. A search warrant for the vehicle Defendant was operating
4 was granted on the basis that it was believed to be utilized in a drug trafficking
5 operation. ECF No. 1 at ¶ 6-7. DEA agents conducted multiple controlled buys of
6 large quantities of methamphetamine and fentanyl laced pills from suspects involved
7 in the DTO. ECF No. 1 at ¶ 6, *See also* Attachment A. The DTO utilized several
8 vehicles, residences, and a business to traffic narcotics to include the vehicle the
9 Defendant was driving. *Id.* The Defendant himself was suspected to be on of the
10 "Joel's" previously identified as member of this DTO. Task Force agents and police
11 officers had surveilled the car throughout the day on July 21, 2021 and had observed it
12 located at 3829 Kennewick Ave., Kennewick, WA (Affordable Landscaping), a
13 location where just days before, agents had seized numerous assault rifles and other
14 drug trafficking evidence. *See*, Attachment A and B. Moreover, TFA Pitts knew this
15 vehicle, several suspects and large shipment of narcotics had been outstanding since
16 the execution of the search warrants.

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18 In addition to the above facts, at the time of the traffic stop, the Defendant gave
19 evasive answers regarding his cell phone and was noted to be nervous and "want[ed]
20 to distance himself from the situation and/or vehicle." ECF No. 1 at ¶ 20. All this
21 information combined provided a reasonable and articulable basis to conduct a pat
22 down search of the Defendant once he was removed from the vehicle.
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1 *Re drug activity: In \$109,179 in United Currency*, the Ninth Circuit noted that
2 the factors giving officers reasonable suspicion to believe the suspect was armed and
3 dangerous included knocking on the door of a room where officers knew a drug deal
4 was taking place, questioning of the suspect failed to dispel officer's suspicion he was
5 armed and dangerous, and the suspect's close proximity to the officer in a "small
6 room." *United States v. I.E.V.*, 705 F.3d 430, 436 (9th Cir. 2012) (citing *United States*
7 *v. \$109,179 in United States Currency*, 228 F.3d 1080 (9th Cir. 2000)). These
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9 circumstances are analogous to those of Defendant. Defendant had been observed in a
10 vehicle known to be involved with a DTO and had been observed at residence and
11 business associated with that DTO. In agreeing to the officers' offer of a ride,
12 Defendant would have been in a space even smaller than the "small room" in
13 *\$109,179 in United States Currency* and in much closer proximity to the officers,
14 therefore posing a larger risk to officer safety.

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18 The frisk was properly confined to discover weapons. The officer felt a bulge
19 in an exterior pocket on Defendant's cargo pants. ECF No. 1 at ¶ 22. This frisk
20 included only the Defendant's outer clothing, where he could have easily reached a
21 weapon that could have been used to injure officers. In fact, during the frisk, a
22 weapon was located which further supported the continued frisk of the Defendant.
23
24 Officer Safranek, who conducted the frisk, merely mentioned to TFA Pitts that "based
25 upon the exterior pat down of [Defendant], he believed there to be a large amount of
26 pills in the cargo pocket." ECF No. 1 at ¶ 22. Defendant overheard this statement and
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1 subsequently volunteered to the officers that he had 2,000 pills in his pocket. *Id.* As a
2 result of this statement, Defendant was placed into custody and a search incident to
3 arrest uncovered four plastic bags of light blue pills suspected to be laced with
4 fentanyl. ECF No. 1 at ¶ 23.

6 Thus, based on this same vehicle's involvement in a drug trafficking
7 investigation, its presence at a search warrant location where multiple firearms and
8 other evidence had just been seized, the Defendant's own suspected involvement in
9 that DTO and the Defendant's actions while interacting with the officers, there was
10 more than sufficient basis to conduct a *Terry* frisk for weapons. Unlike the facts in
11 the *Thomas* decision, at no time was the Defendant threatened at gun or taser point.
12 The contact was cordial and voluntary, and the DEA agents present had specific and
13 articulated facts to support the pat down search. As a result, the frisk was justified and
14 was properly limited in scope.

18 2. *Defendant's acceptance of a ride from officers on the condition that he be*
19 *subjected to a frisk for weapons constituted voluntary consent to the frisk.*

20 Even if this Court were to find that the officers did not have reasonable
21 suspicion to frisk Defendant for weapons, the Defendant voluntarily consented to the
22 frisk when he accepted the officers' offer of a ride. The Defendant expressly agreed
23 to the condition that they frisk him for weapons prior to entering the patrol vehicle.
24 Contrary to the Defendant's assertions, this consent was not the subject of coercion as
25 the Defendant was given the choice as to whether he wanted a courtesy ride. In
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1 possession of his cell phone and with access to other options than the courtesy ride,
2 the Defendant chose to accept the ride and voluntarily consented to the pat down
3 search.

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5 Consent is a well-established exception to the warrant requirement under the
6 Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citing
7 *Davis v. United States*, 328 U.S. 582, 593-94 (1946)). “Consent searches are part of
8 the standard investigatory techniques of law enforcement agencies” and are “a
9 constitutionally permissible and wholly legitimate aspect of effective police activity.”
10 *Fernandez v. California*, 571 U.S. 292, 298 (2014) (citing *Schneckloth v. Bustamonte*,
11 412 U.S. 218, 228 (1973)). It is necessary that consent to a search be voluntary.
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13 Voluntariness is a question of fact to be determined from the totality of the
14 circumstances. *Id.* at 248-49.

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17 The Ninth Circuit has identified five factors to be considered in determining the
18 voluntariness of consent to a search:

19 (1) whether defendant was in custody; (2) whether the arresting officers have
20 their guns drawn; (3) whether Miranda warnings have been given; (4) whether
21 the defendant was told he has a right not to consent; and (5) whether defendant
22 was told a search warrant could be obtained. The fact that some of these factors
23 are not established does not automatically mean that consent was not voluntary.

24 *United States v. Russell*, 664 F.3d 1279, 1281 (9th Cir. 2012), citing *United States v.*
25 *Morning*, 64 F.3d 531, 533 (9th Cir.1995) (quoting *United States v. Castillo*, 866 F.2d
26 1071, 1082 (9th Cir.1988)).

1 In finding that *Russell* consented to the pat down search the Ninth Circuit
2 concluded,

3 Russell was not in custody when the search occurred, nor did the officers have
4 their guns drawn, or even visible at any point during the encounter with Russell.
5 The third factor, Miranda warnings, does not bear on this case because Russell
6 was not under arrest at the time of the searches and once he was arrested, the
7 warnings were provided. “It would ... make little sense to require that Miranda
8 warnings ... be given by police before requesting consent.” *United States v.*
Vongxay, 594 F.3d 1111, 1120 (9th Cir.2010) (quoting *United States v. Ritter*,
752 F.2d 435, 438 (9th Cir.1985)).

9 The fourth factor is either neutral or slightly favors Russell: he was not told that
10 he could refuse to consent. However, the district court found that the officers
11 told Russell he was free to leave, which is an instructive, but certainly less
12 clear, way of saying that consent could be refused. In any event, consent to a
13 search is not necessarily involuntary simply because officers failed to provide
14 notice of the right to refuse. *United States v. Cormier*, 220 F.3d 1103, 1113 (9th
15 Cir.2000). Finally, the officers did not tell Russell that they could obtain a
16 search warrant if he refused to consent. The district court's finding that Russell
17 affirmatively consented to the search, coupled with consideration of this five-
18 part inquiry, supports the district court's conclusion that the consent was free
19 and voluntary. There was no error, let alone clear error, in this determination.

20 664 F.3d at 128.

21 In the instant case, the totality of the circumstances establishes the voluntary
22 nature of the Defendant's consent. During the entire contact with the Defendant, there
23 were no weapons drawn. At the time of the traffic stop, only one uniformed officer
24 approached the Defendant. The Defendant provided his identification and during their
25 contact, also provided his number when asked. The Defendant was in fact, seen using
26 his phone during the traffic stop. The Defendant willingly handed the officer his cell
27 phone so the officer could assist him in locating the number. See, *INS v. Delgado*,
28 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984) (routine request for

1 identification “does not, by itself, constitute a Fourth Amendment seizure” and the
2 fact that “most citizens will respond to a police request,” and “do so without being
3 told they are free not to respond, hardly eliminates the consensual nature of the
4 response”). The cell phone was given directly back to the Defendant. The Defendant
5 possessed this cell phone during the entirety of the interaction. The Defendant was
6 allowed to remain inside the vehicle. When the DEA agents arrived, they were in
7 plain clothes and did not display their weapons.
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10 Once the DEA agents had arrived, TFA Pitts contacted the Defendant at the
11 driver’s side window. Again, no guns were drawn and TFA Pitts was in plain clothes.
12 The Defendant at that time was advised of the existence of the warrant. TFA Pitts
13 asked the Defendant if he would agree to be interviewed about the drug investigation.
14 When asked if he wished to engage in an interview back at the police station with
15 TFA Pitts, the Defendant declined, evidencing the non-coercive environment
16 surrounding the traffic stop. ECF No. 1 at ¶ 20. The Defendant was also made aware
17 of the drug investigation before he consented to the pat down search.
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21 Given that Defendant no longer had a vehicle, officers offered to give him a
22 courtesy ride to where he needed to go or whatever else the Defendant wanted to do.
23 ECF No. 1 at ¶ 21. The Defendant again, in possession of his cell phone, did not ask
24 to make a call; did not ask to have someone pick him up. Instead, the Defendant
25 accepted the offer of a courtesy ride. *Id.* The Defendant requested that the officers
26 drive him back to the construction site he had left from. *Id.* TFA Pitts informed
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1 Defendant that he would need to be searched for weapons before officers could
2 transport him. ECF No. 1 at ¶ 21. The United States disputes the Defendant's claims
3 that he was not asked to consent to the pat down search and that they were already
4 patting him down when he was advised of the need to do so before the courtesy ride.
5 However, the circumstances of the contact up to that point and the Defendant's actions
6 further belie his proposed testimony. Whether he was advised of the need for a pat
7 down or expressly asked if he would agree, when he voluntarily exited the vehicle
8 after asking for the courtesy ride, he knew he was not under arrest and did not have to
9 go with them. Having already evidenced his free will by declining an interview, the
10 Defendant was free to ask them to stop at any time. If he did not understand why they
11 were frisking him, he could have stopped to ask. He did not. The Defendant accepted
12 both the officers' offer of a ride and the condition that he would need to be searched
13 for weapons if he chose to accept that ride. As a result, Defendant voluntarily
14 consented to the frisk for weapons.

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20 Given these facts, it is simply not accurate to state the Defendant had no way
21 of avoiding the search as the Defendant argues. *See*, ECF 51 at 9. The Defendant
22 asserts this was a "bait and switch" and compares the agent to that of a used car
23 salesman. *Id.* Upon review of the video and the reports, there is simply no basis to
24 impugn TFA Pitts in that manner. This was a serious investigation into a substantial
25 DTO. *See*, Attachments A and B. TFA Pitts had rightfully obtained a federal search
26 warrant for this vehicle, a vehicle that was not observed for several days after the
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1 execution of search warrants. The execution of warrants that were well known to this
2 DTO by the time of this traffic stop. Therefore, there were several factors to consider
3 in addition to officer safety in contacting this vehicle.
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5 Throughout the video, the intention of the agents was to “kick him loose” and to
6 offer him a courtesy ride. The Defendant was informed that he was not under arrest
7 on several occasions and therefore free to leave the officers’ presence at any time.
8 Circumstances also allowed Defendant multiple other options to leave the area
9 without agreeing to a ride from the officers, which required him to be frisked for
10 weapons. Defendant was stopped at approximately 5:30pm, during daylight hours.
11 ECF No. 1 at ¶ 18. The stop occurred at the intersection of West 12 and Highway
12 397, an area surrounding with multiple businesses open to the public where Defendant
13 could have sought help returning to the construction site if he had desired. *Id.*
14 Defendant also retained possession of his phone, which he could have used to call for
15 assistance from someone other than the officers. ECF No. 1 at ¶ 19; See also *United*
16 *States v. Brown*, 996 F.3d 998, 1005-1006 (9th Cir, 2021).
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21 Even where a defendant was in the desert after dark four miles from the nearest
22 highway and thirteen miles from the city where he wanted to go, the Ninth Circuit still
23 determined the defendant “voluntarily agreed to join the officers” in their vehicle.
24 *United States v. Carillo*, 902 F.2d 1405, 1411 (9th Cir. 1990). Here, Defendant was
25 explicitly informed that he was not under arrest and had other avenues available to
26 leave the site of the stop. However, he chose to accept the offer of a ride from law
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1 enforcement and agreed to the condition that he be subjected to a frisk for weapons
2 prior to that ride. The Defendant expressly consented to the exterior pat down frisk
3 and further volunteered that he had pills in his pocket.
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5 3. The Defendant's voluntary statement the items felt by the officer, were 2000
6 pills provided sufficient probable cause to conduct a full search of his
7 pockets.

8 Once the presence of the drugs became known in this manner, they could be
9 seized without the Defendant's consent pursuant to a tactile variation on the "plain-
10 view" rule. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334
11 (1993); See also, *United States v. Mattarolo*, 209 F.3d 1153, 1158 (9th Cir. 2000);
12 *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (finding
13 contraband seized incident to a lawful *Terry* search is admissible). Moreover, where a
14 Defendant is arrested based upon probable cause, officers may conduct a search of a
15 defendant's person without a warrant and evidence obtained as the result of such a
16 search should not be excluded. *United States v. Robinson*, 414 U.S. 218 (1973).
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18 As stated above, the pills found in Defendant's pocket were not discovered as
19 the result of the officer's frisk of Defendant for weapons. The pills were only
20 discovered after Defendant volunteered to officers that he had 2,000 pills in his
21 pocket. ECF No. 1 at ¶ 23. As a result of this statement, officers obtained probable
22 cause to arrest Defendant and placed him into custody. *Id.* Moreover, they were
23 justified in removing the pills from his pocket based upon his statement. This arrest
24 further allowed officers to conduct a full search of Defendant, during which they
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1 found the pills in his pocket. *Id.* This search was well within an exception to the
2 warrant requirement and as a result does not require that the evidence obtained during
3 the search be excluded.
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5 **IV. CONCLUSION**

6 For the above reasons, the United States respectfully submits there is no basis to
7 suppress the evidence and Defendant's motion should be denied.
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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the counsel of record, Adam R. Pechtel.

s/
Stephanie Van Marter
Assistant United States Attorney